



# Oregon

Kate Brown, Governor



550 Capitol St. NE  
Salem, OR 97301  
Phone: 503-378-4040  
Toll Free: 1-800-221-8035  
FAX: 503-373-7806  
[www.oregon.gov/energy](http://www.oregon.gov/energy)

**To:** Energy Facility Siting Council

**From:** Christopher M. Clark, Rules Coordinator

**Date:** February 28, 2020

**Subject:** Agenda Item I: Rulemaking to Clarify Standard for Contested Case Requests on Type A Amendments for the March 13, 2020 EFSC Meeting

**Attachments:** Attachment 1: Final Order Regarding Application of OAR 345-027-0371(9) dated February 12, 2020.  
Attachment 2: Draft Notice of Proposed Rulemaking

---

## STAFF RECOMMENDATION

Staff recommends Council initiate rulemaking to clarify the standard for an issue to justify a contested case under OAR 345-027-0371(9) by issuing the Notice of Proposed Rulemaking included as **Attachment 2**.

## BACKGROUND

At its January meeting, the Council clarified that the word “may,” as it is used in OAR 345-027-0371(9), requires Council to find that the person requesting the contested case has raised an issue that *is in some degree likely* to affect the Council’s determination as to whether the facility complies with applicable laws and Council standards, and that Council will not automatically grant a request for a contested case regarding a proposed order on a site certificate amendment simply because a person has raised an issue that “might,” or “could” affect its determination regarding the facility’s compliance. Interpreting the word “may” to mean “to be in some degree likely” is consistent with previous practice and the normal dictionary meaning of the word.

Council then moved to issue an order clarifying how the rule would be applied to future requests for reconsideration. The Order was attached to the Order denying the Requests for Reconsideration of Council’s decision to deny a Contested Case on Amendment #4 to the Site Certificate for Summit Ridge Wind Farm issued on February 12, 2020 (see Attachment 1.)

Because the order merely clarified Council’s existing interpretation of the rule, additional rulemaking is likely not required at this time; however, upon further consideration of the issue staff believes that amending the rule through the formal rulemaking process could provide

additional clarity in the process and would provide interested parties an opportunity to submit views on what standard is appropriate.

As described above, Council currently interprets OAR 345-027-0371(9) to mean that a person must raise an issue that *is in some degree likely to* affect the Council's determination as to whether the facility complies with applicable laws and Council standards. While any expression of probability is imprecise by definition, we acknowledge that "some degree" covers a broad range and could itself be interpreted to include any non-zero probability. To be consistent with other rules which convey a standard of proof for Council findings, staff recommends the Council replace the term "may" in OAR 345-027-0371(9) with the term "is reasonably likely to."

Staff believes this standard would be sufficient to express that a requestor must provide evidence or argument to demonstrate that the likelihood that the Council's decision will be affected by a contested case is beyond mere possibility but does not require them to convince the Council that such an outcome is certain.

#### **RECOMMENDED COUNCIL ACTION**

Staff recommends Council conduct rulemaking to clarify the meaning of OAR 345-027-0371(9), and amend the rule as follows:

"After identifying the issues properly raised the Council must determine whether any properly raised issue justifies a contested case proceeding on that issue. To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that ~~may~~ **is reasonably likely to** affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request."

Staff further recommends that Council authorize staff to issue the Notice of Proposed Rulemaking included as Attachment 2 to this notice. The notice would establish a public comment period on the proposed rule change, and would set a public hearing for the Council's June meeting.

#### **ATTACHMENTS:**

- Attachment 1: Final Order Regarding Application of OAR 345-027-0371(9) dated February 12, 2020
- Attachment 2: Draft Notice of Proposed Rulemaking